

Nguyen (Migration) [2021] AATA 3928 (23 July 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Thanh Van Nguyen
VISA APPLICANT:	Mr Duy Doan Nguyen
CASE NUMBER:	1810503
DIBP REFERENCE(S):	BCC2017/2018662
MEMBER:	Michael Cooke
DATE:	23 July 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 23 July 2021 at 5:34pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 March 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicant applied for the visa on 4 June 2017 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the applicant did not meet the definition of spouse in s.5F of the Act.
5. The review applicant appeared before the Tribunal on 23 July 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant by telephone from Vietnam.
6. The Tribunal has received additional information addressing the reg.1.15A(3) circumstances and rebutting the adverse findings of the delegate in a recent submission.
7. The review applicant was represented in relation to the review by her registered migration agent.
8. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the applicant meets the definition of spouse.

SPOUSE/DE FACTO (cl.309.211(2), cl.309.221)

Whether the parties are in a spouse or de facto relationship

10. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in

r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

13. Findings and reasons about each matter in r.1.15A(3)(a), (b), (c) and (d), and any other circumstances of the relationship under r.1.15A(2):

- Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
14. The parties live in different countries so do not enjoy a financial relationship in the sense of joint bank accounts, legal obligations, sharing of day-to-day household expenses and joint ownership of assets. In oral evidence the sponsor indicated that she received sufficient income from her Centrelink benefits. She insisted that she did not require overseas financial assistance from the applicant as he was (she explained) a ‘working person’.
15. When living in Sydney for the short time in 2016 they rented a property with the sponsor’s children.
16. The Tribunal is satisfied that (within the geographical limitations) the parties have (where possible) shared a spousal financial relationship.
- Nature of the household – including any joint responsibility for care and support of children; parties’ living arrangements; and any sharing of housework.
17. The parties live in different countries so do not normally have a spousal household. When living in Sydney for a short time in 2016 they rented a property with the sponsor’s child and the applicant’s student son.
18. The Tribunal is satisfied that within the geographical limitations the parties have (where possible) shared a spousal household involving joint responsibility for care and support of children and sharing of housework.
- Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
19. The Tribunal finds that the parties represent themselves to other people as being married to each other because they have lived jointly with members of their families in Sydney. The Tribunal is satisfied that their family members support the relationship. They have outlined how they met initially through mutual friends at a joint social activity. The sponsor has never returned to Vietnam since her arrival in 1995 - she informs. The applicant attempted to return to Australia after returning to Vietnam in 2016 but was twice refused a Visitor visa.
20. The Tribunal is satisfied that (within the geographical limitations) the parties have a spousal social relationship.

- Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
21. The parties met initially in 2010 when the applicant visited his student daughter in Australia. They then maintained telephone contact until 2015 when the applicant accompanied his young student son to Australia - as his guardian. The parties reacquainted in a direct sense and - after an initial rejected proposal - the sponsor agreed and married the applicant in 2016 in Sydney. They lived together until such time as he was required to return home. His visa stipulation disabled him from making an onshore Partner visa application. The parties have provided evidence of significant telephonic communication over the last few years. The applicant has suffered the long-term effect of depression following the birth of her autistic son. She claims that one of the most important aspects of her relationship is the emotional support given her by the applicant. They see the relationship as long-term.
22. The Tribunal finds that the nature of the persons' commitment to each other is spousal.
- Any other circumstances of the relationship.
23. The Tribunal has considered the full circumstances of the relationship and makes the following findings against s.5F(2)(b)-(d). The parties have a mutual commitment to a shared life to the exclusion of others; a genuine and continuing relationship and they live together or not separately and apart on a permanent basis.
24. Based on the above the Tribunal **is** satisfied that the requirements of s.5F(2) are met at **the time the visa application was made** and at **the time of this decision**.
25. Therefore, the visa applicant **meets** cl.309.211 and cl.309.221.
26. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

27. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Michael Cooke
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).